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No. 09-592

In The
Supreme Court of the United States

ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN,
Petitioners,

v.

MARTHA COAKLEY, Attorney General for the Commonwealth of Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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Question Presented.

To protect public safety and patient access to medical care, the Massachusetts Legislature limited access during business hours to public ways and sidewalks within a fixed "buffer zone" immediately next to entrances and driveways of reproductive health care facilities. In an interlocutory decision, the United States Court of Appeals for the First Circuit held that the statute as amended in 2007 is constitutional on its face. Petitioners' claim that the statute is unconstitutional as applied was stayed and has not yet been decided by the district court.

The question presented is:

Whether the court of appeals correctly applied the long-settled rule of law that statutes regulating the time, place, or manner within or by which communicative activities may take place in public fora are constitutional so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

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Statement of the Case.

This case concerns a 2007 amendment to a Massachusetts statute that creates a protective "buffer zone" around the entrances and driveways to reproductive health care facilities ("RHCFs"). The United States Court of Appeals for the First Circuit held that "the 2007 Act represents a permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety. It is content-neutral, narrowly tailored, and leaves open ample alternative channels of communication. It is, therefore, a valid time-place-manner regulation, and constitutional on its face." Pet. App. 26a.

(1) Statutory Background.

(a) The Original Act.

The Massachusetts Legislature passed the original Reproductive Health Care Facilities Act in August 2000. Pet. App. 4a. Based on a history of violence outside clinics and ongoing harassment and intimidation of women attempting to obtain medical services at such facilities, the Legislature concluded that existing laws did not adequately protect public safety immediately next to RHCFs. *Id.* 33a-37a.

The Legislature considered adopting a fixed, 25-foot buffer zone around clinic entrances and driveways. *Id.* 35a. After *Hill v. Colorado*, 530 U.S. 703 (2000), however, the Legislature instead barred unwelcome approaches for certain purposes near an RHCF entrance or driveway, like the statute upheld in *Hill*. Pet. App. 36a-39a.

The 2000 Act included the following provisions. *First*, similar to the statute in *Hill*, the Act made it unlawful to approach within six feet of someone on a public way or sidewalk inside a zone defined by an 18-foot radius from any RHCF entrance or driveway, or within a six-feet wide rectangle extending from clinic entrances to the street, if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Pet. App. 38a-39a (quoting Mass. St. 2000, c. 217, § 2(b)).

Second, the Legislature exempted the following four categories of persons from the Act's restrictions:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Pet. App. 39a (quoting Mass. St. 2000, c. 217, § 2(b)).

Third, the Act stated that its provisions "shall only take effect during a facility's business hours and [only] if the area contained within the radius and

rectangle described in said subsection (b) is clearly marked and posted." *Id.*

The original Act was challenged in federal court on constitutional grounds. Pet. App. 41a-43a. The First Circuit reversed a preliminary injunction against enforcement, holding that the Act, "on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint." *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"). On remand, the district court held that the Act was constitutional on its face and as applied. *McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002) (facial challenge); *McGuire v. Reilly*, 271 F. Supp. 2d 335, 343 (D. Mass. 2003) (as applied). The First Circuit affirmed both rulings, and this Court denied certiorari. *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004), *cert. denied*, 544 U.S. 974 (2005) ("*McGuire II*").

(b) Public Safety Was Still Threatened.

The Massachusetts Legislature revised the Act in November 2007 because "there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 75a; *see also id.* 17a, 26a, 43a-64a. The purpose of the 2007 revision was "to increase forthwith public safety at reproductive health care facilities." *Id.* 62a (quoting Mass. St. 2007, c. 155).

At a public hearing before its Joint Committee on Public Safety and Homeland Security, the Legislature had learned that—despite the original Act—clinic access was still being physically blocked,

patients were still being harassed as they tried to enter clinics, and the "approach" element of the floating buffer zone made it very hard for law enforcement officials to enforce the original Act. Pet. App. 45a-58a. It "heard testimony from RHCF staff, volunteers and law enforcement personnel regarding specific incidents of patient harassment and intimidation in the areas immediately outside RHCF entrances and driveways." *Id.* 47a-48a.

Witnesses described how protesters regularly barred access to clinics by physically blocking doors and driveways, and screamed from close range and from immediately next to doorways or driveway entrances at patients trying to enter clinics. Pet. App. 48a-52a. They testified that these confrontations "terrified" patients; that some patients "reported feeling too intimidated by the pacing protesters to enter the property, and turning back;" and that women trying to drive to a clinic would regularly turn away because protesters were blocking the driveway. Pet. App. 48a-50a. A Boston Police Captain testified that protesters would "wear[] police hats and police uniforms" as a way to get patients trying to enter the clinic in Boston to consent to the protester's approach. Pet. App. 52a. Attorney General Coakley summarized the ongoing history of interference with clinic access, and explained why it constituted an important public safety problem. Pet. App. 46a-47a.

In addition, law enforcement representatives told the Legislature that: (i) it was very difficult to enforce the original Act because it was hard to determine whether a protester had "approached" someone else without their consent within the

restricted area; and (ii) creating a fixed and clearly defined buffer zone around RHCF entrances and clinics was needed to ensure public safety. Pet. App. 53a-58a. Capt. Evans compared the 18-foot buffer zone area to a "goalie's crease," where "everybody is in everybody's face," which "makes it very difficult" for the police to determine whether an unlawful "approach" had been made within the buffer zone. *Id.* 56a. He explained that this made it very hard to keep patients safe immediately next to clinic entrances. *Id.* 54a-58a.

The Legislature revised the Act in the manner recommended by law enforcement personnel. Pet. App. 53a-58a, 62a-64a. It did so only after considering whether the proposed revision would adequately protect the public's rights under the Free Speech Clause. Pet. App. 17a, 58a-61a.

(c) The 2007 Amendment.

In November 2007 the Legislature deleted the floating buffer zone provision of the original Act that made it unlawful to approach within six feet of unwilling listeners for specified purposes inside the protected area, and replaced it with a new fixed buffer zone provision that makes it unlawful to "knowingly enter or remain on a public way or sidewalk adjacent to [an RHCF] within a radius of 35 feet of any portion of an entrance, exit or driveway of [an RHCF]." Pet. App. 63a (quoting Mass. G.L. c. 266, § 120E1/2(b)).

In all other substantive respects the buffer zone provision of the Act remains identical to the version previously upheld in *McGuire I* and *McGuire II*. The

Act continues to apply only during a clinic's business hours, and only if the buffer zone limits are "clearly marked and posted." Pet. App. 64a (quoting Mass. G.L. c. 266, § 120E1/2(c)). In addition, the same four categories of persons are exempt from the buffer zone restrictions. Pet. App. 63a-64a.

(2) Factual and Procedural Background.

Petitioners filed this action in January 2008, claiming that the 2007 Act is unconstitutional on its face and as applied. Pet. App. 6a, 30a-31a. Petitioners also moved for a preliminary injunction. *Id.* 31a. Petitioners have not been arrested or threatened with arrest for violating the revised Act, and there is no indication in the record that anyone else has either. Pet. 8 n.3. At Petitioners' request, the district court bifurcated trial of the facial challenge from trial of the as-applied challenge. *Id.* 6a-7a, 31a. The court consolidated the hearing on the motion for preliminary injunction with the hearing on the merits of the facial challenge. *Id.* 7a.

Petitioners' facial challenge was decided after a bench trial on an agreed-upon factual record. Pet. App. 30a-33a. The parties stipulated that the affidavits and exhibits submitted in connection with the preliminary injunction motion would serve as the trial record for the facial challenge. *Id.* 31a. In August 2008 the district court held that the 2007 Act is constitutional on its face, and denied Petitioners' request for injunctive relief. Pet. App. 29a-122a. Petitioners appealed this interlocutory order under 28 U.S.C. § 1292(a)(1). *Id.* 7a.

The court of appeals held that the revised Act is constitutional on its face. Pet. App. 1a-28a. It found

that the law is content neutral because it "was enacted in response to legitimate safety and law enforcement concerns, and was justified by those objectives without reference to the content of any speech." *Id.* 10a. Petitioners had conceded before the district court that, in Petitioners' words, "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to "clear out the bottleneck ... immediately adjacent to" clinic doors and driveways, and that each of these goals is "a legitimate interest of the government." Pet. App. 88a.

The court "proceeded, therefore, with intermediate scrutiny," *id.* 15a, following the well-established standard that applies to "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur," *id.* 9a. Applying the next prong of this test, the court of appeals found that the law is narrowly tailored to serve a substantial governmental interest in enhancing public safety around RHCF entrances, without burdening substantially more speech than necessary. *Id.* 15a-17a. With respect to the third prong, the court held that the 2007 Act leaves open ample alternative channels of communication, because it "places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone," and, on its face, the size of the zone was not unreasonable. *Id.* 19a-20a.

In addition, the court of appeals rejected Petitioners' claims that the Act is overbroad on its face because it applies to all potential speakers within the buffer zone instead of applying only to

abortion-related speech. *Id.* 20a-22a. Finally, the court held that the Act is not unconstitutionally vague and does not constitute an unconstitutional prior restraint on speech. *Id.* 24a-26a. The court denied Petitioners' petition for rehearing and rehearing en banc. *Id.* 123a-124a.

Petitioners moved to stay their claims that the Act is unconstitutional as applied while their appeal regarding the facial challenge is pending. The district court granted the motion. The as-applied challenge remains stayed. *Cf.* Pet. 8 n.3.

Reasons for Denying the Petition.

The decision below is consistent with the Court's well-established standard for how to evaluate the constitutionality of restrictions on the time or place for engaging in expressive activity in public fora, and does not raise any important but unresolved federal question. Nor does it conflict with decisions of other courts of appeals. Moreover, the petition concerns an interlocutory appeal that does not raise any issue of immediate importance. Further review is not warranted.

I. There Is No Conflict with the Court's Prior Buffer Zone Cases.

A. The Decision Below Is Consistent with *Madsen*, *Schenck*, and *Hill*, and Applied the Proper Legal Standard.

The court of appeals' determination that it was constitutionally permissible for the Massachusetts Legislature to create a 35-foot fixed buffer zone around clinic entrances and driveways, in order to

ensure safe patient access to medical services provided by RHCFs, is consistent with the Court's precedent. In particular, the decision below is consistent with *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Hill v. Colorado*, 530 U.S. 703 (2000).

Madsen upheld an injunction barring protesters from public rights-of-way within thirty-six feet of the property line of a particular RHCF. *See* 512 U.S. at 768-70. *Schenck* upheld an injunction barring protesters from demonstrating within fifteen feet of entrances and driveways of any RHCF in the Western District of New York. 519 U.S. at 366 n.3, 374-76, 380-82.[1] *Hill* upheld a Colorado statute that made it unlawful, within 100 feet of health care facility entrances, to approach closer than eight feet of someone without their consent in order to pass a leaflet, display a sign, or engage in oral protest, education, or counseling. 530 U.S. at 714-35.

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[1] Though *Schenck* involved two different 15-foot buffer zones, Petitioners fail to distinguish them. *Cf.* Pet. 13. The Court upheld "the fixed buffer zones around the doorways, driveways, and driveway entrances," because they "are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." *Schenck*, 519 U.S. at 380-82. It struck down the "floating" portion of the injunction—which required all protesters to stay at least 15 feet away from any person or vehicle seeking access to or leaving a clinic, no matter where the person or vehicle was located—because "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction" and thus created a "substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 377-78.

The fixed buffer zone established by the 2007 Act is very similar to the buffer zones that were established by injunction and upheld in *Madsen* and *Schenck*. Since the buffer zone established by the revised Act (with a 35-foot radius around each clinic entrance or driveway) is substantially smaller than the one upheld in *Madsen* (with a 36-foot radius around clinic's entire property line), and since the injunctions in *Madsen* and *Schenck* passed muster under a more stringent standard of review than applies here,[2] it was entirely consistent for the court of appeals to hold that the revised Act is constitutional on its face.

Despite the obvious relevance of this precedent, Petitioners do not mention *Madsen* at all and only cite *Schenck* with respect to the portion of the decision that struck down the floating buffer zone. Pet. 13. By ignoring these decisions affirming fixed buffer zones so similar to the 2007 Act, Petitioners tacitly concede there is no inconsistency between

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[2] If this case involved an injunction that restricts speech, rather than a statute of general application, the lower courts would have been required to apply "a somewhat more stringent application of general First Amendment principles" and determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765 (reviewing buffer zone injunction). But since the 2007 Act is a law of general application reflecting "a general policy choice" by the Massachusetts Legislature, the court of appeals correctly assessed the Act "under the constitutional standard set forth in *Ward* [*v. Rock Against Racism*, 491 U.S. 781, 791 (1989)], rather than a more strict standard." *Hill*, 530 U.S. at 731 (reviewing buffer zone statute). *See* Pet. App. 15a-16a.

them and the decision of the court of appeals that would support certiorari review.[3]

Furthermore, the court of appeals' summary of the governing law is also consistent with this Court's precedents. Consistent with *Hill*, the First Circuit ruled that the revised Act falls into the category of "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur." Pet. App. 9a. Thus, the court of appeals' application of the "intermediate scrutiny" standard that governs whether such time and place regulations violate the Free Speech Clause is consistent with long standing precedent of this Court. *Hill*, 530 U.S. at 731. The First Circuit

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[3] In arguing for rehearing en banc below, Petitioners tried to distinguish *Madsen* and *Schenck* on the ground that they involved "expressly targeted injunctions against repeat lawbreakers." Petitioners' C.A. Pet. for Reh'g and Reh'g En Banc 13. Under this theory, Petitioners told the First Circuit that "this is a case of *first impression* in the federal courts of appeal that tests a law of general application creating a 35-foot fixed buffer zone around abortion clinics. . . ." *Id.* 2 (emphasis added). They argued that "[t]he speech restriction in the Act is *entirely unprecedented*." *Id.* 13 (emphasis added). Since then, a second court of appeals has upheld a similar buffer zone against constitutional challenge. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3rd Cir. 2009) (upholding statute creating 15-foot buffer zone around entrances to hospitals and health care facilities). The fact that *Madsen* and *Schenck* upheld fixed buffer zones under the more searching standard applicable to injunctions does not make the court of appeals' decision in this case unprecedented. But even if, *arguendo*, Petitioners were correct in arguing below that their challenge to the revised Massachusetts statute raised an issue "of first impression," then the Court should allow the issue to percolate further and wait to see whether a genuine and serious conflict develops among the courts of appeal on an important federal question.

correctly held that "[r]egulations of this type will be upheld as long as 'they are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information.'" Pet. App. 9a (quoting *Ward*, 491 U.S. at 791).

The statute "does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur." *Hill*, 530 U.S. at 731. Petitioners remain free to engage in any kind of speech and to offer any type of information they wish, so long as they do not do so within a clearly marked and posted buffer zone during clinic business hours. Pet. App. 19a-20a, 95a-100a. As the district court found:

> [A]s long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.

Pet. App. 96a; *accord id.* 19a (court of appeals). Since anyone who wants to speak with or obtain literature from a protester or counselor standing near a buffer zone may do so, the Act does not prevent clinic patients or anyone else from "hear[ing] and receiv[ing] information and offers of alternative assistance." *Cf.* Pet. 27.

In sum, the 2007 Act does not "outlaw[] peaceful handbilling," prohibit "peaceful conversations with willing listeners," or ban any other kind of speech. *Cf.* Pet. 13. Petitioners' "attempt to analogize" the Act "to a total ban on distribution of handbills is imaginative but misguided." *Ward*, 491 U.S. at 799 n.7. *Cf.* Pet. 15.

Petitioners may disagree with the result reached in this case, but that disagreement is based on nothing more than an assertion that the court of appeals misapplied a well-settled rule of law. It would not be appropriate to grant certiorari to review the court of appeals' application "of a properly stated rule of law" to the facts of this particular case. *See* Sup. Ct. R. 10; *accord United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

B. Factual Differences From *Hill* Do Not Warrant Certiorari.

Petitioners and their *amici* have a singular focus on this Court's decision in *Hill v. Colorado*. They argue (wrongly) that the decision below conflicts with *Hill* because the Massachusetts statute at issue here differs from the Colorado statute upheld in that case. Pet. 10, 12-25. Certiorari review is not appropriate merely because the Massachusetts statute was

revised to establish a fixed buffer zone very similar to the injunctions upheld in *Madsen* and *Schenck*, and to delete the floating buffer zone provision that had been modeled on the statute upheld in *Hill*.

1. Elimination of the Restriction on Approaching Unwilling Listeners.

Petitioners incorrectly cite *Hill* for the proposition that the First Amendment bars any time, place, or manner regulation that has the effect of limiting communications with willing listeners in any way. Pet. 7-8, 10-14, 16, 27, 33. Given the nature of the Colorado statute, which under certain circumstances made it unlawful to approach within eight feet of another person without their consent, *Hill* addressed whether "the protection the statute provides for the unwilling listener" violated "the First Amendment rights of the speaker." *See* 530 U.S. at 708. The revised Massachusetts statute no longer has comparable restrictions on approaching listeners without their consent. But that factual difference from *Hill* does not raise any important federal question that would warrant certiorari review.

The Court has repeatedly held that an appropriately tailored law may constitutionally bar protesters from approaching willing and unwilling listeners alike inside a fixed buffer zone, where there is ample opportunity to communicate from outside the zone. *See Schenck*, 519 U.S. at 374-76, 380-82 (15-foot, content-neutral buffer zone around RHCF entrances and driveways); *Madsen*, 512 U.S. at 768-70 (36-foot, content-neutral buffer zone around entire RHCF property); *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (plurality opinion upholding content-

based statute that bars solicitation of votes and display of campaign materials within 100 feet of polling place); *id.* at 214-16 (Scalia, J., concurring on ground that statute was reasonable, viewpoint-neutral regulation of nonpublic forum).

The 2007 Act allows Petitioners to approach whomever they want, as closely as they want, and for any lawful purpose, so long as they do so outside the buffer zone. Pet. App. 19a, 96a. It also lets Petitioners invite clinic patients to approach them to receive handbills, to converse, or for any other reason. *Id.* "Any willing listener is at liberty to leave the zone, approach those outside it, and request more information." *Id.* 19a. That Petitioners may not approach either willing or unwilling listeners within the buffer zone does not mean that the decision below conflicts with *Hill* or that it raises any unsettled issue that would merit certiorari review. *Cf. Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 n.12 (1981) (rule barring distribution of literature at state fair except from fixed locations was valid time, place, and manner restriction, even though "it prefers listener-initiated exchanges to those originating with the speaker").

2. "Normal Conversational Distance."

Nor did *Hill* recognize any absolute constitutional right to communicate with an unwilling listener from a "normal conversational distance" at all times or in all places within a public forum Pet. 4-5, 8-9, 12-13, 15-16. It is true that *Hill* upheld Colorado's unusual 8-foot limit on unwelcome approaches within 100 feet of clinic entrances in part because it did not interfere

with normal conversation. *Hill*, 530 U.S. at 726-27. But *Schenck*, *Madsen*, and *Burson* all upheld fixed buffer zones (with radii of 15 feet, 36 feet, and 100 feet, respectively) that had the effect of limiting normal conversation within the zone.

The court of appeals' decision below is consistent with more than 70 years of the Court's precedent regarding restrictions on the time, place, or manner of engaging in communicative activities on public sidewalks or streets. "This Court has long recognized the validity of reasonable time, place, and manner regulations on [a public] forum so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication." *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (citing, inter alia, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941)); *accord Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing, inter alia, *Schneider v. New Jersey*, 308 U.S. 147 (1939)).

The principle that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" has always been a central element of Free Speech Clause precedent. *Heffron*, 452 U.S. at 647 (upholding state fair rule barring sale or distribution of materials, including leaflets and literature, except from fixed location); *accord Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (upholding ordinance prohibiting posting of signs on public property); *Adderley v. Florida*, 385 U.S. 39, 48 (1966)

(upholding conviction for criminal trespass of protesters blocking jail driveway).

Indeed, from the beginning of modern Free Speech Clause jurisprudence almost a century ago, the Court has made clear that legislatures may restrict the time, place, or manner of speech in order to protect the public health, safety, or convenience. *See, e.g.*, *Cox*, 312 U.S. at 576 (holding that States may regulate "time, place and manner" of using public fora to protect public safety and convenience, and thus may require permit to use public streets for parade); *Schneider*, 308 U.S. at 160 (noting that States "may lawfully regulate the conduct of those using the streets" in order to keep streets and sidewalks open to traffic and pedestrians); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

"[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but ... it need not be the least restrictive or least intrusive means of doing so." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*, 491 U.S. at 798). Petitioners conceded below that "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to "clear out the bottleneck ... immediately adjacent to the doors and to the driveways [of clinics]," and that these are both "legitimate interest[s]." Pet. App. 88a. The revised Massachusetts buffer zone was narrowly tailored to serve those interests, just like the much larger buffer

zone upheld in *Madsen*, 512 U.S. at 768-70. Because the Act protects only the clinic entrances and driveways where there was a history of physical obstruction, close-quarter confrontations, and other public safety problems, it does not burden substantially more speech than necessary. Pet. App. 16a-17a, 20a, 89a-91a.

The court of appeals correctly respected the Legislature's conclusion that the revised Act was necessary to protect public safety and clinic access. Pet. App. 16a-17a; *accord Ward*, 491 U.S. at 800. When evaluating whether a content-neutral statute is narrowly tailored to further legitimate interests, a court is "not at liberty to substitute [its] judgment for the reasonable conclusion of a legislative body." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 212 (1997). It would similarly be "constitutionally unwarranted" for a court to reject the Legislature's conclusions regarding the threat to public safety at clinic entrances on the ground that they were not supported by sufficient fact finding. *Id.*, 520 U.S. at 213. A Legislature "is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Id.*

3. Application to Clinics.

Petitioners now argue that, because the Act was narrowly tailored to apply only outside RHCFs, it is an "abortion-specific" restriction. Pet. 4, 10. They made the opposite argument below, however, asserting that the Act is unconstitutionally overbroad because it "reaches not only the abortion-

related speech of McCullen" but has the same effect on all kinds of speech regardless of its content. Petitioners' C.A. Br. 35; *accord* Pet. App. 22a, 102a. Petitioners' about-face underscores that the geographic scope of the Act's application raises no unresolved and important federal question.

The mere fact that the statute in *Hill* applied to all medical facilities, while the Massachusetts statute applies only to RHCFs where abortions are offered or performed, does not mean that the court of appeals' decision "conflicts with *Hill's* content-neutrality analysis." Pet. 17-19. A legislature may ensure that a content-neutral time, place, or manner restriction is narrowly tailored by confining its application to "the place where the restriction is most needed." *Hill*, 530 U.S. at 730. That is what the Massachusetts Legislature did here.

The revised Act safeguards RHCF entrances and driveways because that is where protesters regularly undermined public safety and threatened and intimidated patients and staff. Pet. App. 17a, 43a-64a. "As described above, the [Legislature's] investigation demonstrated that there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 75a. The legislative record is "replete with factual references to specific incidents and patterns of problematic behavior around RHCFs." *Id.* 12a, 78a. But nothing in the record supports Petitioners' suggestion that there have been similar problems outside medical facilities "at thousands of other locations" that are not covered by the Act. *Cf.* Pet. 19.

Petitioners' argument that the revised Act is too narrowly tailored echoes one rejected in *Hill*. There, the Court rejected an assertion that the Colorado statute failed to meet the test of content-neutrality because it protected only the entrances of medical facilities and did not apply more broadly, and held that a time, place, or manner regulation is not "unconstitutionally content based" merely because it applies to specific locations and not others. *Hill*, 530 U.S. at 724. For example, "[a] statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports...." *Id.* Similarly, the Massachusetts statute is not content-based merely because it applies to RHCFs and not other medical facilities. Pet. App. 76a; *McGuire I*, 260 F.3d at 44.

The petition misapprehends the constitutional test for content-neutrality. "Government regulation of expressive activity is content neutral so long as it is *'justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *accord Hill*, 530 U.S. at 720; *Madsen*, 512 U.S. at 763. In this case, "[t]he Act is justified by 'conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services,' without *any* reference to content." Pet. App. 75a (emphasis in original) (quoting *McGuire I*, 260 F.3d at 44); *see also* Pet. App. 10a.

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it

has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. Because the Act is content neutral on its face and serves content-neutral purposes, it is content neutral whether or not it tends to impose greater burdens on "the speech of antiabortion protesters," *Madsen*, 512 U.S. at 762-63, and even if it was passed to solve problems created by "the conduct of the partisans on one side of a debate," *Hill*, 530 U.S. at 724-25. "The statute is not limited to those who oppose abortion. It applies ... to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725.

In sum, the fact that the 2007 Act applies to RHCFs and not all medical facilities does not create any conflict between the decision below and *Hill*.

4. Clinic Employee Exemption.

The statutory exemption for clinic "employees or agents ... acting within the scope of their employment" (Pet. App. 125a) does not conflict with *Hill* either. *Cf.* Pet. 20-25. This exemption furthers the legislative goal of ensuring safe access to RHCFs. The legislative history of the original Act shows that "clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs," including protecting them from "physical altercations" with protesters. *McGuire I*, 260 F.3d at 46 (cited at Pet. App. 13a). "As the record reflects, the same is true today." Pet. App. 81a.

The exemption for clinic employees acting within the scope of their employment does not "grant special

speech rights to speakers from abortion clinics." *Cf.* Pet. 20. "On its face, the statute does not permit advocacy of any kind in the zone. Moreover, the Attorney General's enforcement position expressly and unequivocally prohibits any advocacy by employees and agents of the RHCF's in the buffer zone." Pet. App. 83a. The Massachusetts Attorney General informed law enforcement personnel that this exemption only allows "clinic personnel to assist in protecting patients and ensuring their safe access to clinics," and does not allow them to engage in the sort of pro-choice speech or advocacy that Petitioners say would destroy the Act's viewpoint neutrality. *Id.* 64a-65a. On its face, this limited exemption does not turn the statute into a viewpoint-based regulation of speech. Pet. App. 13a; 78a-84a; *McGuire I*, 260 F.3d at 45-47; *McGuire II*, 386 F.3d at 52 & n.1, 64.

The Third Circuit reached the same conclusion regarding a very similar exemption in a local buffer zone ordinance. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3rd Cir. 2009). *Brown* concerned a Pittsburgh ordinance that establishes a 15-foot buffer zone around entrances to hospitals and health care facilities. 586 F.3d at 266. The ordinance exempts "authorized security personnel employees or agents of the hospital, medical office, or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." *Id.* at 273-74. The City construed the exemption as only applying where clinic employees or agents are actually engaged in providing such assistance, and as not allowing any person in the buffer zone to engage in "demonstrations or oral protest, education, or counseling with other individuals, including patients or other protesters." *Id.* at 274. The Third

Circuit held that, especially with this construction of the exemption, the buffer zone provision is content-neutral on its face. *Id.* at 274-75.

The finding below that the clinic employee exemption is viewpoint neutral on its face does not conflict with *Hill*, where no similar issue was present. And it is consistent with *Madsen*, which held that an injunction that applied a buffer zone only against anti-abortion protesters, but not against clinic employees, agents, or anyone else, was not viewpoint based. 512 U.S. at 762-63.

If Petitioners were able to show that police let clinic agents engage in pro-choice advocacy from within a buffer zone, they could press the issue in their as-applied claim. But a facially-neutral provision that merely allows clinic staff to greet patients and make sure that they can enter an RHCF safely does not conflict with *Hill* or otherwise raise an important federal question that must be resolved at this time.

In any case, this supposed defect in the Act does not call into question the statute as a whole and therefore provides no basis for granting certiorari. It could be cured by eliminating this exemption and allowing clinic employees to do their job by standing outside the buffer zone and then escorting patients into the clinic. (Petitioners never challenged the separate exemption for persons "entering or leaving" an RHCF. Pet. App. 125a.) Under Massachusetts law, "[t]he provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof." Mass. G.L.

c. 4, § 6, clause Eleventh. Whether the court of appeals erred in declining to strike this exemption from the Act does not raise an important federal question that merits certiorari review.

5. Petitioners Waived the Overbreadth Claim in the Petition.

Petitioners now argue that the Act is overbroad because people could inadvertently violate the law while merely passing through the buffer zone on their way to a destination other than the clinic. Pet. 16-17. Petitioners waived this point, however, by failing to raise it "either in the district court or in [their] briefs on appeal." Pet. App. 22a-23a. Because this issue arose for the first time at oral argument on appeal, the court of appeals did not decide it. *Id.*[4] This Court should not grant certiorari review to consider an issue that was waived and not decided below.

Even if this issue had not been waived, it would not merit further review because "it seems likely that the alleged overbreadth is not sufficiently sprawling to serve as the foundation for a constitutional challenge." *Id.* 24a. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers*

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[4] Although Petitioners argued below that the Act is overbroad because the restriction on remaining within the buffer zone reaches not only abortion-related speech but also other expressive activity (Pet. App. 20a-22a; Petr's C.A. Opening Br. 34-38), they did not argue that the scope of the exception for persons passing through the buffer zone renders the Act overbroad until oral argument before the First Circuit (Pet. App. 23a n.3).

for Vincent, 466 U.S. at 800. "[P]articularly where conduct and not merely speech is involved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Hill*, 530 U.S. at 732 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *accord Virginia v. Hicks*, 539 U.S. 113, 121-23 (2003).

The court of appeals correctly rejected Petitioners' further suggestion that to avoid overbreadth the buffer zone "should have been limited to abortion-related speech." Pet. App. 22a. That the Act "burdens all speakers" is "a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 530 U.S. at 730-31. It does not make the Act overbroad. *Id.* at 732. "If a failure to distinguish among speakers in itself gave rise to overbreadth problems, legislatures would be forced to choose between passing laws that were not content-neutral or laws that were overbroad." Pet. App. 22a.

C. This Case Is Not a Vehicle For Revisiting *Hill*.

The Court should also reject Petitioners' invitation to take this case in order to revisit and overrule *Hill*. Pet. 25-28. There is no reason to reconsider *Hill* and, in any event, this case provides no vehicle for taking a second look at *Hill*.

The Court's decision in *Hill* elicited strong dissents and subsequent criticism focused primarily on two issues: whether legislatures may provide special protection for unwilling listeners in public fora without violating the First Amendment, and

whether the Colorado statute was content-based because it restricts certain kinds of communications but not others.

Neither of those issues is raised here. While the 2000 Act was modeled on the *Hill* statute, the 2007 Act substitutes a fixed buffer zone that excludes all non-exempt individuals from a clearly marked and posted buffer zone, without regard to whether they are engaged in any particular kind of speech or communicative activity.

The question that prompted the Court to grant certiorari in *Hill* was "whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener." 530 U.S. at 708. The Colorado statute was crafted "to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range" anywhere within 100 feet of a health care facility entrance. *Id.* at 718 n.24. The *Hill* dissenters argued that the Colorado statute was therefore unconstitutional, because the First Amendment generally requires that people must tolerate unwelcome speech in public fora. *Hill*, 530 U.S. at 749-50 (Scalia, J., dissenting, with Thomas, J.) and 771-72 (Kennedy, J., dissenting). The majority disagreed, holding that the Colorado statute legitimately seeks to protect the "right to be let alone" as well as the right of "passage without obstruction," in the particular context of patients seeking access to health care facilities. *Id.* at 714-18. But this case provides no opportunity to reconsider the extent to which the First Amendment may limit

States' ability to restrict approaches toward unwilling listeners, because the floating buffer provision modeled on the Colorado statute has been deleted from the Massachusetts law.

The *Hill* dissenters also argued that the Colorado statute was content-based because it did not subject all speakers to the floating buffer zone, but instead only constrained messages of "protest, education, or counseling." *See Hill*, 530 U.S. at 742-749 (Scalia, J., dissenting, with Thomas, J.), and at 765-770 (Kennedy, J., dissenting). The majority again disagreed, holding that this aspect of the Colorado law did not make the statute content-based. *Id.* at 720-25. But this provision has also been deleted from the Massachusetts statute, which applies equally to all forms of speech, all speakers, and all viewpoints. Thus, this case provides no occasion to reconsider whether time, place, or manner restrictions may be applied to communications undertaken for particular purposes.

Nor does this case provide any opportunity to decide whether *Hill* "should be reconsidered as being in conflict with *United States v. Grace*, 461 U.S. 171 (1983), [or] *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972)," as the court of appeals' decision was consistent with both *Grace* and *Mosley*. *Cf.* Pet. 27.

Grace struck down a federal statute that imposed a "total ban on carrying a flag, banner or device on the public sidewalks" surrounding the Supreme Court Building. 461 U.S. at 182. But the Court made clear that "those sidewalks, like other sidewalks, [remain] subject to reasonable time, place and manner restrictions." *Id.* at 183-84. The total

ban was held not to be a reasonable "place" restriction because there was no indication that it was tailored to remedy conduct that had, for example, "obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id.* at 180-82. Here, in contrast, the Massachusetts statute does not impose a total ban on speech, but instead was specifically aimed at solving actual interference with clinic access and threats to public safety immediately next to RHCF entrances.

Mosley struck down an ordinance that banned most picketing outside of schools, but allowed peaceful labor picketing. Because it restricted certain speech based on its subject matter, it violated the Equal Protection Clause. 408 U.S. at 95-96. The Court stressed, however, that it has "continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests," and that "the State may have a legitimate interest in prohibiting some picketing to protect public order." *Id.* at 98. Here, the Massachusetts statute is a permissible "time" and "place" regulation that applies equally to all protestors, regardless of the content of their speech or the viewpoint they wish to express.

II. There Is No Conflict with Other Circuits.

The First Amendment precedent governing laws that have the effect of restricting the time, place, or manner of speech activities is well-settled. The Petition confirms that lower courts have not had great difficulty in applying it. Lower courts strike

down broad limitations on speech that are not narrowly tailored to serve legitimate interests, and strike down complete bans on speech. There is no confusion about an important federal question that could be resolved by certiorari review in this case.

A. Petitioners Identify No Conflict With Other Buffer Zone Cases.

The one other court of appeals decision concerning a similar statute is consistent with the First Circuit's decision in this case. *See Brown*, 586 F.3d at 273-76 (upholding 15-foot buffer zone around hospital and clinic entrances). Petitioners do not identify any true conflict between the decision below and decisions of other courts of appeals that would warrant certiorari review.

The portion of *Berger v. Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), cited by Petitioners involved very broad restrictions on speech that are quite different from this case. *Cf.* Pet. 28-29. *Berger* invalidated a rule adopted at the Seattle Center—an "80-acre expanse of public space" that is home to the Space Needle, museums, sports arenas, theaters, a performance hall, and 23-acres of public parks—that prohibited all "speech activities" within thirty feet of a "captive audience," defined as any person waiting in line to obtain goods or services or attend any event, in an audience at an event, or seated where food or drinks are consumed. *Id.* at 1035, 1053-57 (striking down "Rule G.4"). As is clear from *Berger*, however, such a broad ban on speech has little in common with the narrow buffer zone statute at issue here. First, the Ninth Circuit also held that a separate rule restricting street performers to sixteen

designated locations was not unconstitutional on its face, as it addressed a "significant problem" caused by "street performers blocking entranceways and egresses" and there was a disputed issue of material fact—that the district court was directed to decide on remand—as to whether that rule leaves open ample alternative channels for communication. *Id.* at 1048-50 (addressing "Rule F.5"). Second, in explaining why the broad "captive audience" rule did not serve a legitimate governmental purpose, the Ninth Circuit distinguished *Madsen*, *Schenck*, and *Hill* on the ground that the Seattle rule did not protect the "unique privacy and self-determination interests involved in protecting medical facilities." *Id.* at 1054-55. In sum, there is no reason to assume that the Ninth Circuit, faced with facts similar to those here, would reach a result different from the First Circuit's decision below.

In *Phelps-Roper*, the Eighth Circuit did "not decide the merits of Phelps-Roper's claim" that a statute barring picketing near a funeral procession or location violated the Free Speech Clause. *Phelps-Roper v. Nixon*, 545 F.3d 685, 692 (8th Cir. 2008), *reh'g and reh'g en banc denied*, 545 F.3d 685 (8th Cir.), *cert. denied*, 129 S.Ct. 2865 (2009); *cf.* Pet. 29-30.[5] The court held "only that Phelps-Roper is entitled to a preliminary injunction while the constitutionality of [the statute] is thoroughly reviewed" by the district court. *Id.* at 694. It did so in part because the challenged statute, in its application to funeral processions, created "'floating' buffer-zones [that] provide citizens with no guidance

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[5] Petitioners' notation that *Phelps-Roper* was decided *en banc* is incorrect. Pet. 29. The Eighth Circuit denied *en banc* review, over the dissent of five judges. *See* 545 F.3d at 685.

as to what locations will be protest and picket-free zones and at what times." *Id.* at 693. The court emphasized that it was "only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute." *Id.* at 688 n.1, 694. In this posture, *Phelps-Roper* did not decide any important federal question in a way that conflicts with the First Circuit decision upholding the Massachusetts fixed buffer-zone statute.

Finally, Petitioners assert that the decision below conflicts with an unpublished and unappealed district court decision regarding a local ordinance creating a 20-foot buffer zone outside medical facilities,[6] and with another unappealed district court decision regarding a state law creating a 300-foot buffer zone around funerals.[7] Pet. 30-31. A purported conflict between the court of appeals' decision below and a district court decision is not a basis for this Court to grant a writ of certiorari. *See* Sup. Ct. R. 10.

B. Cases Involving "Complete Bans on Speech" Are Distinguishable.

Petitioners note that other courts of appeals have struck down "complete bans on speech in public forums," consistent with *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Pet. 11-12. *Jews for Jesus* struck down as "substantially overbroad" a resolution that barred all "First Amendment

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[6] *Halfpap v. City of West Palm Beach*, 2006 WL 5700261, *24 (S.D. Fla. 2006).

[7] *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 996-96 (E.D. Ky. 2006).

activities" within the Central Terminal Area at Los Angeles International Airport. 482 U.S. at 570, 577. In contrast, the Massachusetts statute is not a complete ban on speech. The court of appeals explained that:

> The matter at hand is readily distinguishable from *Jews for Jesus*. That case involved a direct ban on First Amendment activity, whereas this case involves a time, place, and manner restriction. The Court has left no doubt but that time-place-manner restrictions should not be analyzed in the same way as direct bans on speech.

Pet. App. 21a (citing *Hill*, 530 U.S. at 731); *accord, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) ("complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information" and thus warrant more stringent review (citation omitted)).

The decisions cited by Petitioners do not conflict with the court of appeals' holding. *Cf.* Pet. 32. That other courts of appeals have reached varying results in materially different circumstances does not mean there is any conflict on an important federal question. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.").

As shown at pages 29-30 above, *Berger* struck down a very broad speech restriction that differed materially from the narrow buffer zone at issue here.

Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005), held that trespass notices prohibiting plaintiff's "presence in and around certain state courthouses" in Vermont violated his First Amendment rights of access to court proceedings and free expression. *Id.* at 58, 79-93. The Second Circuit emphasized that "[t]he defendants' singling out of Huminski for exclusion, thereby permitting all others to engage in similar activity in and around the courts, suggests to us that the trespass notices are not reasonable." *Id.* at 92. But it distinguished the case from one involving a "generally applicable" statute limiting access to particular areas. *Id.*

Parks v. Finan, 385 F.3d 694 (6th Cir. 2004), concerned a rule requiring a permit before using any part of the 10-acre grounds that surround the Ohio state capitol buildings for speeches or public gatherings. *Id.* at 696. The Sixth Circuit upheld the rule as applied to groups, but affirmed an injunction against applying the rule to individuals because doing so was "not sufficiently narrowly tailored to the interests [identified by defendants] of protecting property, promoting safety, and permitting others to speak." *Id.* at 704. But the court "emphasize[d] the limited nature of our holding," and clarified that "the injunction does not prevent [defendants] from modifying [the] regulations to require a prior permit for certain types of individual conduct, albeit expressive, that may more directly implicate concerns of public order or safety." *Id.* at 706. In contrast to *Parks*, the Massachusetts statute was

narrowly tailored to address specific public safety concerns. Pet. App. 10a, 14a-15a, 17a, 26a, 86a-91a.

Finally, *First Unitarian Church* involved "the prohibition of expressive activity by Salt Lake City on a public pedestrian easement retained by the City" after it closed part of Main Street to automobile traffic and sold it to the Church of Jesus Christ of Latter-Day Saints. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th Cir. 2002), *cert. denied sub nom., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. First Unitarian Church*, 539 U.S. 941 (2003). The Tenth Circuit held that the land subject to the easement remained a public forum, and that prohibiting all expressive activity in the easement violated the First Amendment. *Id.* at 1121-33. But it made clear that the city could "enact reasonable time, place, and manner restrictions" on use of the easement in order to protect "public safety, accommodate[e] competing uses of the easement, control[] the level and times of noise, and [further] similar interests." *Id.* at 1132. That is exactly what the Massachusetts Legislature has done.

In sum, there is no reason to assume that the Second, Sixth, Ninth, or Tenth Circuits would reach a result different from the First Circuit's decision below if faced with facts similar to those here.

III. The Interlocutory Posture of the Case Weighs Against this Court's Review.

The district court stayed all proceedings regarding Petitioners' claim that the 2007 Act is unconstitutional as applied. Pet 8 n.3. Respondent

has not yet been able to conduct discovery, present a full case, or cross-examine Petitioners and any other witnesses they may present. The district court noted that it did "not have a complete record from which to make ... findings" regarding the actual effects of the revised Act. Pet. App. 33a. The court of appeals' decision is thus interlocutory, "a fact that of itself alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

The petition focuses on questions that will have to be answered when the district court determines whether the revised Act is constitutional as applied. Petitioners argue that the current Massachusetts statute may not leave open adequate alternative channels of communication, and that the exception for clinic employees and agents may be enforced in a manner that renders the statute viewpoint-based. Pet. 8 n.3, 12-17, 20-25. The district court made clear that these claims will be decided during the as-applied challenge; it did not address them in connection with the facial challenge at issue here. Pet. App. 83a n.180, 95a n.217, 96a n.220. It would not be appropriate for the Court to review these questions without the benefit of fact finding based on a full evidentiary record.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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